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The Courts' Enforcement of the Rule of Law

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THE COURTS' ENFORCEMENT OF THE RULE OF LAW†

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I. INTRODUCTION

A presentation such as this may properly commence by referring to the enormous body of law that exists to govern the modern administrative state. Indeed, there are many who decry the fact that we have too many laws and are overregulated. Others may believe that we are grossly underregulated. Clearly, the adminstrative process touches the life of every person, as there is little that one may do without coming into contact with a government official or administrative agency. Since the subject vitally affects the rights of all persons, a discussion of judicial review in the modern adminstrative state is both important and appropriate.

To introduce the theme of the role of the courts in giving effect to the rule of law, I should like to start with a brief aphorism from the XII Tables of Rome, an early code of law that reflects great wisdom. "Salus populi suprema lex"—"the welfare of the people is the supreme law." With these four words, in 50 B.C., more than two thousand years ago, the Romans formulated the ultimate goal and purpose of law.[1]

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Footnotes have been added by the members of the *St. John's Law Review.*

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[1] *See generally* Re, *The Roman Contribution to the Common Law*, 29 FORDHAM L. REV. 447 (1961) [hereinafter Re, *The Roman Contribution*].

II. Modern Government and Administrative Agencies

Commencing with such a concise and precise formulation of the fundamental goal of law, it is appropriate to begin by asking why we find ourselves today in the process of verbal inundation by boundless oceans of laws, rules, and regulations? A simple answer is that the world today is far more complex, and that the government does, and is expected to do, much more than even in the recent past. We are far removed from the minimal role of government that kept out invaders, and maintained peace and order at home. Indeed, the number of civilians employed by the federal government approaches the total number of citizens of the country at the time the Constitution was drafted in 1787. We have gone beyond the regulatory state to the benefactory state which provides a host of services, including those that formerly were clearly regarded as proper functions for the church and other voluntary institutions.

The moment citizens say "there ought to be a law," or "government should do this or that," we have expanded the role and functions of government, thereby increasing administration and bureaucracy. Seldom do we hear cries that government is doing too much, or that there should be less government and less regulation. Indeed, on those rare occasions when it is decided to deregulate an industry or activity, citizens immediately start to complain that they are being abused or mistreated, again reactivating the cycle calling for laws to regulate and control.[2]

Hence, it can be expected that in the modern administrative state, public officers and administrative agencies will continue to affect vitally the lives of all persons on a daily basis. As a consequence, it is clearly more realistic to concentrate upon the legal controls, devices, or remedies that may be used to assure that public officials act lawfully, and ensure that they do not deprive persons of rights and privileges guaranteed under the Constitution. Surely no one should quarrel with the notion that a lawful society requires that all offices of government act lawfully, that is, within the bounds of the law.[3] In the modern administrative state this

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[2] *See, e.g.*, FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) (citizens' groups challenge FCC's deregulation of licensing requirements); Telecommunications Research & Action Center v. FCC, 800 F.2d 1181 (D.C. Cir. 1986) (suit brought subsequent to FCC's elimination of certain regulatory policies).

[3] *See, e.g.*, Proceedings of the Second Annual Judicial Conference of the United States Court of International Trade, *The Rule of Law in International Trade* (Oct. 23, 1985), *re-*

means that administrators must act within the bounds of their delegated authority, and comply with all limitations upon the power of government.

It is not questioned that powers to control the administration of governmental functions are possessed by all three branches of government. For example, the executive may appoint and remove officials; the legislative branch may repeal or amend statutes; and the judiciary may declare that an administrative agency has acted unlawfully, and set aside illegal administrative action. This Article will focus on judicial review of administrative action. Within certain legal bounds defined by justiciability, standing, and abstention, persons aggrieved by governmental or administrative action may resort to the courts to air their grievances or complaints.

III. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

In our society, judicial review of administrative action has assumed great importance and value. Since more and more persons resort to the courts for a vindication of their rights, we find ourselves in a period described as a litigation or due process explosion.[4] Although this explosion has caused serious backlogs in the courts, it is important to note that it also manifests a confidence in the courts as agencies of government.[5] Many years ago, a scholar wrote: "When a plain man who thinks that he has been wronged by another declares that he 'will have the law on him,' it expresses his conviction that he can get justice from the courts."[6] The strength of this conviction has led Americans to accept with eagerness the principle that an independent judiciary is necessary to a

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printed in 111 F.R.D. 503, 505 (1985).

> In a democratic society, all officials and agents of government are expected to act lawfully, that is, within the bounds of law. They must perform their duties within the scope of their lawful authority, and must comply with all of the limitations imposed by law upon their powers. This is the meaning and promise of the rule of law.

Id.

[4] Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1268 (1975). Judge Friendly stated that since 1970, a "due process explosion" has occurred with respect to executive and administrative action. *Id.*; *see also* Re, *The Administration of Justice and the Courts*, 18 SUFFOLK U.L. REV. 1, 1-4 (1984) (discussing the growing burden on courts as citizens increasingly look to courts for redress of grievances).

[5] *See* Re, *Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 8 N. KY. L. REV. 221, 256-57 (1981) [hereinafter Re, *Judicial Independence*].

[6] S. BALDWIN, THE AMERICAN JUDICIARY 376 (1905).

constitutional government.

Many reasons may be stated for the increased number of persons who resort to the courts for a vindication of their rights when aggrieved by public officials or agencies of government. A letter of complaint to a mayor, governor, or even the President, setting forth a grievance against an official or administrative agency, may result in a reply prepared by the agency itself. Improper administrative action results occasionally from venality or, more commonly, from incompetence or indifference. Often, in pursuing what may be regarded as the broader governmental objective, an official may transgress the statutory authority or the established lawful procedure. Corrective legislative action is usually slow and cumbersome. Thus, a brief, and yet accurate, answer to the question why an aggrieved individual will resort to the courts is to be found in the unique role of the judiciary in our society.

IV. UNIQUE ROLE OF THE JUDICIARY

Since the Act of Settlement of 1701, the judges have been assured an enviable independence. In our Declaration of Independence, a specific grievance against King George III pertained to the removal of judges at the King's pleasure. As a consequence, in Article III of the Constitution we adopted the language of the Act of Settlement, and federal judges hold office "during good behavior," removable only by impeachment.[7] Beyond, and also in part as a consequence of independence, we have developed a sense of constitutionalism. Any law in contravention of the Constitution is null and void.

This doctrine, enunciated for us in the case of *Marbury v. Madison*[8] in 1803, followed the English tradition articulated in Sir Edward Coke's famous *dicta* in *Dr. Bonham's Case*[9] in 1610. This case arose from an exclusive patent King Henry VIII had given the Royal College of Physicians to regulate the practice of medicine in London, and which had been confirmed by Parliament. When Dr.

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[7] *See* U.S. CONST. art. III, § 1. The Constitution states: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ." *Id.*; *see* Re, *Judicial Independence*, *supra* note 5, at 225 (federal judges may be removed from office only through impeachment); *see also* Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980) (stressing the importance of complete independence of the judiciary).

[8] 5 U.S. (1 Cranch) 137 (1803).

[9] 8 Co. Rep. 114a, 77 Eng. Rep. 647 (Common Pleas 1610).

Thomas Bonham, a Doctor of Medicine of the University of Cambridge, was imprisoned for practicing medicine without the College's approval, he brought an action for false imprisonment against the leaders of the College. Justice Coke set forth several arguments denying the authority of the College over Dr. Bonham, but it is his *dicta* in the case that has retained its vitality to the present day. Justice Coke declared: "[T]he common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void . . . ."[10] This *dicta* never attained general acceptance under the Parliamentary system in England. Nevertheless, its influence was felt in early American cases in the state courts before the adoption of the Constitution, and later served as the fundamental underpinning of *Marbury v. Madison.*

Apparently, the first American case that nullified a legislative act is the 1657 case of *Browne v. Geedings,*[11] in which a court in Salem struck down an act of a town meeting on the authority of *Dr. Bonham's Case.* Other cases in pre-constitutional America followed Lord Coke's *dicta,* but perhaps the most famous early case is *Trevett v. Weeden.*[12] In *Trevett,* a Rhode Island court struck down as null and void an act of the State Assembly which required the acceptance of paper money as legal tender. This decision is particularly significant in that it was handed down just one year before the meeting of the Constitutional Convention, and was undoubtedly in the minds of at least some of the Framers at the Convention.

In summary, under our constitutional system, it is for the courts to say whether the laws of the legislature are constitutional, and what the laws mean in their application to specific cases.

It is also within the judiciary's power to determine whether any person has been deprived of any rights guaranteed by the Constitution. Hence, any person who alleges a deprivation of due process or equal protection of the law may resort to the courts for

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[10] *Id.* at 118a, 77 Eng. Rep. at 652.

[11] Unpublished opinion, *mentioned in* 2 RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY, MASS. 1656-1662, at 47 (Essex Institute, Salem, Mass. 1912).

[12] Unpublished opinion, Superior Court of Judicature—Court of Assise and General Gaol Delivery (1786), *discussed in* C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 105-12 (2d ed. 1932).

vindication of these constitutionally protected rights. In essence, this is the function that assures a government of laws and the rule of law.[13] It is the unique role of the courts, a coequal branch of government, to determine whether any person has been deprived of life, liberty, or property without due process of law.

V. Validity and Meaning of Legislation

The first duty of a court of the United States is to ensure that the legislative enactment before it is in conformance with the Constitution. The idea that all legislation must comply with the constitutional mandate is perhaps best expressed by the following short passage from Chief Justice Marshall's seminal opinion in *Marbury v. Madison*: "It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it . . . ."[14] Chief Justice Marshall went on to explain:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.[15]

Thus, it has long been beyond doubt that we must defer to the Constitution as the higher, or supreme, law.

It is important, however, to remember that the judicial function is not limited to passing upon the validity of statutes. As a practical matter, courts are called upon more often to determine the meaning, that is, the proper interpretation and application of statutory enactments. Statutes are seldom, if ever, written so clearly and comprehensively that there is no need to determine their meaning in particular cases.[16]

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[13] *See, e.g.*, United States v. Lee, 106 U.S. 196, 220 (1882) (no person, including the President and his officers, is above the law); C.B.S. Imports Corp. v. United States, 450 F. Supp. 724, 728 (Cust. Ct. 1978) ("all public officials [must] obey the mandates of the Constitution"). Congressman Peter Rodino has stated: "Surely the reminder that ours is a government of laws and not of men is always timely and cannot be overemphasized." Rodino, Book Review, 23 N.Y.L. Sch. L. Rev. 355, 357 (1977) (reviewing E. Corwin, Presidential Power and the Constitution, Essays (1976)).

[14] 5 U.S. (1 Cranch) 137, 177 (1803).

[15] *Id.*

[16] Re, *International Trade Law and the Role of the Lawyer*, 13 Cal. W. Int'l L.J. 363, 374 (1983) [hereinafter Re, *International Trade Law*]; *see also* Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.) (the meaning of the language of a statute will "vary greatly . . . according to the circumstances").

The duty of interpreting and applying the law has long been recognized to be an awesome responsibility. Indeed, in 1717, in a sermon before the King, Bishop Hoadley declared: "Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the Law-Giver to all intents and purposes, and not the person who first wrote or spoke them."[17] In more modern times, Chief Justice Hughes expressed the same idea: "The Court is the final interpreter of the Acts of Congress. Statutes come to the judicial test . . . with respect to their true import, and a federal statute finally means what the Court says it means."[18]

Of course, this does not mean that a court will ignore the will of the legislature. Utilizing accepted principles of statutory interpretation and application, courts must strive to give effect to the intent of the legislature. This task is particularly difficult when situations are presented which the legislature did not anticipate. A case for which there is no specific legislative direction may be referred to as a *casus omissus*, or an "unprovided-for-case." In such cases, the court must fill the voids or *lacunae* in the statute.[19] In the words of Justice Holmes: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially . . . ."[20] The guiding principle in such cases must always be to effectuate the legislative intent that is expressed or implied in the pertinent statute.

Under our system of checks and balances, the Constitution serves as an instrument and symbol of restraint. While it vests substantive powers in each branch of government, it also checks and restrains the exercise of those powers to defined limits. As Chief Justice Marshall emphasized in *McCulloch v. Maryland*,[21] "[W]e must never forget, that it is *a constitution* we are expounding."[22] The courts of the United States, as creatures of the Constitution, stand as a symbol of the law's authority. It is the role and duty of the courts to ensure that all officers of government perform their duties in conformance with the Constitution and the law.

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[17] Bishop Hoadley's sermon preached before the King on "The Nature of the Kingdom or Church of Christ" (Mar. 31, 1717). *See Definitions and Questions in Jurisprudence*, 6 HARV. L. REV. 21, 33 n.1 (1892).

[18] C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 229-32 (1928).

[19] Re, *International Trade Law*, *supra* note 16, at 374.

[20] Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

[21] 17 U.S. (4 Wheat.) 316 (1819).

[22] *Id.* at 407 (Marshall, C.J.).

While it is recognized that a judge's total background and qualities as a human being may sometimes influence his or her outlook, justice must be administered impartially and according to established precedents and principles of law. In Latin, this concept is expressed by the maxim or principle, "*[N]on debet esse sub homine sed sub Deo et sub lege*"—not under Man, but under God and Law.[23]

A splendid example of this principle is the case of *United States v. Lee*.[24] The *Lee* case arose out of an action brought by the son of General Robert E. Lee for the recovery of property of the Lee family against the commandant of Fort Myer and the superintendent of the national cemetery at Arlington. Justice Miller had no difficulty in disposing of the argument that the court could not proceed further "because it appear[ed] that certain military officers, acting under the orders of the President, [had] seized this estate, and converted one part of it into a military fort and another into a cemetery."[25] For Justice Miller there was no doubt that the executive possessed no power to take private property without complying with the constitutional mandate requiring due process and just compensation. He declared: "Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation."[26]

In setting aside this unconstitutional action of the President, Justice Miller expounded the fundamental premise of the rule of law:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
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> It is the only supreme power in our system of government . . . .[27]

To summarize, government officials and administrative officers may not act in contravention of the authority lawfully delegated to

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[23] Re, *The Roman Contribution*, *supra* note 1, at 474.

[24] 106 U.S. 196 (1882).

[25] *Id.* at 219.

[26] *Id.* at 220.

[27] *Id.*

them by Congress or found in the Constitution itself.[28]

VI. Setting Aside Unlawful Agency Action

If an administrative official or agency has acted beyond the lawfully delegated authority, on judicial review, the administrative action will be set aside as *ultra vires*. The following quotation from a leading Supreme Court case is helpful: "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted."[29] Differently stated, the judicial function enforces or effectuates the constitutional and statutory limitations set forth in the statutory grant of authority. Hence, judicial review ensures that agencies act lawfully, and not beyond their lawfully delegated authority.

The correlative of this principle is that if an enactment is lawful, and an agency acts within its delegated authority, the wisdom of the statute is not before the court.[30] The justiciable issue before the court is one of legality or lawfulness, and not the wisdom of the policy embodied in the legislative enactment.

Of course, it is fundamental under our constitutional system that no officer or agency may transgress or violate the rights of any person in contravention of the Constitution's guarantees.[31] The fifth and fourteenth amendments make it abundantly clear that no officer or agency may deprive any person of life, liberty, or property without due process of law. These constitutional guarantees include both substantive and procedural protections.[32] Judicial review serves to ensure that persons affected by agency action are afforded these protections. For example, if a government agency were to deprive a person of a property right, or refuse to grant some benefit to which there is an entitlement, that person must have an opportunity to be heard.[33] The type of hearing to be re-

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[28] *See* Stark v. Wickard, 321 U.S. 288, 309 (1944); C.B.S. Imports Corp. v. United States, 450 F. Supp. 724, 728 (Cust. Ct. 1978).

[29] *Stark*, 321 U.S. at 309.

[30] *See* City Lumber Co. v. United States, 311 F. Supp. 340, 345 (Cust. Ct. 1970), *aff'd*, 457 F.2d 991 (C.C.P.A. 1972). In examining actions by the Tariff Commission, the *City Lumber* court stated: "There is inherent in judicial review the unspoken premise that the wisdom of the congressional enactment is not before the court." *Id.*

[31] *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); *see also* 42 U.S.C. § 1983 (1982).

[32] *See* K. Davis, Administrative Law Text §§ 1.01-1.02, at 1-4 (3d ed. 1972).

[33] *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 572-76 (1975) (students entitled to public edu-

ceived is dependent on the right implicated by the agency action.[34] Intimately related to the concept of due process is the guarantee of equal protection of the law. An agency of government must treat persons similarly situated in a similar manner.[35] If an agency has established procedures or guidelines in a certain area, it must follow its own procedures or furnish a cogent explanation for noncompliance.[36]

A crucial judicial function deals with the courts' mandate to pass upon the validity of all agency actions and procedures. This includes passing upon the validity of agency rules and regulations, as well as adjudications. Enabling acts which establish agencies almost universally empower agencies to pass rules and regulations to carry out their delegated powers. Those rules and regulations are usually more voluminous than the statutory enactment. Once again, it is the function of the court to determine whether these rules and regulations properly fulfill and effectuate the legislative purpose, or whether they go beyond the statute, and therefore, may be set aside as *ultra vires*.[37]

VII. Control of Discretionary Power

Inscribed in stone above the entrance to the Department of Justice building in Washington, D.C., is the inscription "Where law ends, tyranny begins." A variation on this theme appropriate to

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cation may not be denied such without notice and hearing); Goldberg v. Kelly, 397 U.S. 254, 266-68 (1970) (entitlement to welfare benefits allows recipient to have evidentiary hearing prior to termination of such).

[34] *See* Gorman v. University of R.I., 837 F.2d 7, 12 (1st Cir. 1988). The process that is due is measured by a flexible standard depending, *inter alia*, on the particular right in question. *See id.*; *see also* Mathews v. Eldridge, 424 U.S. 319 (1976). In *Eldridge*, Justice Powell noted that:

> [T]he specific dictates of due process generally require[] consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

[35] *See* Caiola v. Carroll, 851 F.2d 395, 399 (D.C. Cir. 1988).

[36] *See* Vitarelli v. Seaton, 359 U.S. 535, 547 (1959) ("If [agency action] is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.") (Frankfurter, J., concurring in part, dissenting in part); Service v. Dulles, 354 U.S. 363, 388-89 (1957).

[37] *See* Columbia Broadcasting Sys. v. United States, 316 U.S. 407 (1942).

the modern administrative state has been suggested: "Where law ends, discretion begins."[38]

An important function of the courts in reviewing administrative action is regulating the exercise of discretionary power. An enabling act typically delegates authority to administrative officers. It is an important judicial function to ensure that the administrative officers do not exceed the scope of their delegated authority. Often, in an enabling act, the legislature provides for the discretionary exercise of authority by the agency in furtherance of its statutory duties. The expertise developed by the agency in its area of jurisdiction, it is believed, justifies the delegation of discretion in the performance of the agency's functions. The discretion afforded an agency, however, is never completely without limits.[39]

Providing discretionary authority to an administrative officer allows an agency to receive the benefits of the officer's expertise, and the agency is able to particularize its action or decision to suit the needs of the specific situation. Aristotle, in his *Ethics*, spoke of *epieikeia*, that is, the notion of equity from which our modern conception of equity is derived. The essence of this Aristotelian concept is the idea that justice should be done in the particular case. The legislature may set forth a universal rule, but this rule may not cover every pertinent situation, and may lead to an unjust result if applied strictly in certain instances. Thus, an exception to the letter of the law or the general rule sometimes must be made in order to achieve justice in the particular case. Although government may hope to achieve "certainty, predictability and efficiency, perhaps too great a price will have to be paid if it is to be attained by sacrificing Aristotelian *epieikeia*, equitable discretion, the demands of natural justice and good conscience."[40]

The delegation of discretionary authority, however, is by no means an abandonment of the rule of law. Of course, irrespective of the degree of discretion granted in the statute, constitutional guarantees may not be transgressed. In addition, the judiciary will review discretionary action to determine whether discretion has

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[38] K. DAVIS, DISCRETIONARY JUSTICE 3 (1980).

[39] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 409-13 (1971). The Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1982), covers judicial review of administrative action to prevent abuses of discretion. *See id.*

[40] E. RE, SELECTED ESSAYS ON EQUITY xi (1955); *see* E. RE, FREEDOM'S PROPHET—SELECTED WRITINGS OF ZECHARIAH CHAFEE, JR. 376, 386 (1981) (letter of Professor Chafee to author).

been abused, or whether a decision has been arbitrary, capricious, or otherwise not in accordance with the law.[41] The courts, however, will generally accord the agency's interpretation of its governing statute a considerable degree of deference. The requirement of judicial deference stems from the need for agency expertise and wisdom in fulfilling the policy objectives of the legislature.[42]

VIII. Principled Administrative Decision Making

Judicial review serves to ensure principled decision making at the administrative level through a variety of devices. First, the reviewing court ensures that the agency takes into account all lawful, relevant, and probative factors in making an administrative determination. Conversely, the reviewing court must ensure that the agency did not consider any impermissible factors in making its decision.

Judicial review, in all cases, results in casting light on the manner in which agencies carry out or perform their delegated responsibilities. Judicial scrutiny of an administrative decision brings to the surface an agency's perception and view of its own function, and serves to illuminate the precise manner in which agencies go about fulfilling their statutory duties.

Another beneficial function performed by the courts on judicial review is to help ensure fairness. Many decisions can be found in which the courts have set aside the administrative action, and, on remand, have ordered administrative reconsideration, because the agency procedures were either unfair or unfairly applied. These are cases in which the parties may be said to have been deprived of basic fairness or procedural due process.[43] Even in cases in which the statute expressly delegates discretionary power, the courts will nonetheless, on judicial review, determine whether that discretionary power has been abused.

An essential element of fairness is the requirement that the

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[41] *See* 5 U.S.C. § 706(2)(A) (1982); *see also* Caiola v. Carroll, 851 F.2d 395, 398 (D.C. Cir. 1988) (court properly reviewed agency action).

[42] *See, e.g.*, Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 863-64 (1984) (agency interpretation entitled to deference even though it has changed over time; change necessary to fulfill policy objectives); *Caiola*, 851 F.2d at 399 (when regulation written and interpreted by several different agencies, the deference normally afforded such regulations is not applicable).

[43] *See Caiola*, 851 F.2d at 400-01.

agency articulate its reasons for a given action.[44] An agency's statement of the reasons for its decision or action serves at least four important functions. First, it requires that the agency focus its reasoning, and ensures that the decision is based on sound and articulable grounds. Second, it provides the parties or those directly affected by the administrative action with a clear explanation of the agency's reasoning and enables them to see that their point of view was fairly considered. Third, it enables the reviewing court to determine whether the agency acted "in accordance with law," and whether all relevant factors were considered. Fourth, it provides guidance to those who potentially may be affected by agency action, and permits them to structure or conduct their affairs in conformity to the agency's standards.[45] If an agency's statement of reasons is inadequate for these purposes, the courts will not hesitate to remand to the agency for a statement that fulfills the statutory requirement.

In cases of delegated discretionary authority, judicial review may also check cases of gross incompetence, and cases in which improper motives or impermissible factors may have played a part in the administrative decision. Hence, in these cases judicial review serves the beneficial purpose of checking extremes of arbitrariness, as well as incompetence, or what may be termed administrative or bureaucratic indifference.[46]

IX. Summary of Benefits of Judicial Review

Under our system, judicial review performs many beneficial functions. In summary, the following benefits may be enumerated. The reviewing court determines the constitutional validity of the enabling act, and the delegation of authority to an administrative

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[44] *See, e.g.*, Gorman v. University of R.I., 837 F.2d 7, 16 (1st Cir. 1988) (public university student entitled to reasons for school's disciplinary action); Freeman v. Rideout, 808 F.2d 949, 952-54 (2d Cir. 1986) (prison must provide reasons for denying prisoner right to confrontation in disciplinary action), *cert denied*, 108 S. Ct. 1273 (1988).

[45] R. Pierce, S. Shapiro & P. Verkuil, Administrative Law and Process § 6.2, at 221-23 (1985). The authors propose the following five reasons why procedural safeguards act as a check on administrative agency discretion: first, they restrict the agency to its statutory authority; second, they increase efficiency in agency problem solving techniques; third, they enhance agency accountability; fourth, they reduce political patronage within agencies; and fifth, they enhance public acceptance of governmental actions. *See id.*

[46] *See* Katunich v. Donovan, 576 F. Supp. 636 (Ct. Int'l Trade 1983). In reviewing a denial of certain benefits by the Department of Labor, the court ordered the Labor Department to make available certain confidential information to those plaintiffs deprived of the benefits. *See id.* at 637-39.

official or agency. The reviewing court determines the meaning of statutes through the interpretation and application of the pertinent legislative enactments. In interpreting an enabling act and related statutes, the court, of necessity, must also fill all omissions or voids in the statute.

In addition to statutory interpretation and application, a court on judicial review determines the validity and meaning of rules, regulations, and policy statements promulgated by the administrative agency. By ensuring that administrative agencies comply with established policies and procedures, and furnish reasonable explanations of their actions, judicial review fosters the consistent and equitable application of law.[47] Courts, then, are able to check extremes of arbitrariness, abuse of discretion, gross incompetence, and bureaucratic indifference. Thus, courts may be said to ensure and promote the basic fairness of the administrative process.

A final benefit of judicial review may not be as readily apparent, but is no less important to our society. The judicial opinion memorializes the law and is a primary source and repository of the law. The courts serve to give life and vitality to the words of the Constitution. By enforcing and giving effect to constitutional guarantees, the courts promote and preserve a lawful society.

In his landmark work, *Democracy in America*, Alexis de Tocqueville devoted special treatment to the "Federal Courts of Justice," and his comments about the role of the judiciary in America are especially pertinent today. He expressed great respect and admiration for the American judicial system and perceived the importance of its role in our constitutional system. He wrote:

> Few laws can escape the searching analysis of the judicial power for any length of time, for there are few which are not prejudicial to some private interest or other, and none which may not be brought before a court of justice by the choice of parties, or by the necessity of the case.[48]

This observation underscores the breadth of the influence the judiciary must have over our society. With the cases presented to them, the judicial branch must determine at some time the lawfulness of nearly all governmental action. Moreover, since the courts reach back into the Constitution as the basis for their decisions,

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[47] *See* Caiola v. Carroll, 851 F.2d 395, 400-01 (D.C. Cir. 1988).

[48] 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 101-02 (P. Bradley trans. 1963) (3d ed. 1850).

they must, of necessity, take a historical perspective as to the operations of government. Thus, although courts are limited to deciding cases properly presented to them for adjudication, the importance of the courts extends far beyond the interests or parochial concerns of the parties before them.

Many years before his appointment to the Supreme Court, Justice Cardozo, with characteristic eloquence, stated that the "chief worth" of the judiciary is not manifested in the few cases "in which the legislature has gone beyond the lines that mark the limits of discretion," but rather, "in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and expression."[49]

The words of Justice Frankfurter, also written before his appointment to the Court, are equally significant:

> The Supreme Court is indispensable to the effective workings of our federal government. If it did not exist, we should have to create it. I know of no other peaceful method for making the adjustments necessary to a society like ours—for maintaining the equilibrium between state and federal power, for settling the eternal conflicts between liberty and authority—than through a court of great traditions free from the tensions and temptations of party strife, detached from the fleeting interests of the moment. But because, inextricably, the Supreme Court is also an organ of statesmanship and the most powerful organ, it must have a seasoned understanding of affairs, the imagination to see the organic relations of society, above all, the humility not to set up its own judgment against the conscientious efforts of those whose primary duty it is to govern.[50]

The relationship of administrative officials and administrative agencies, and the courts, must be one of mutual respect. Each must appreciate and understand the powers, responsibilities, limitations, and special duties of the other. Each has important constitutional functions in a federal system founded upon the separation of powers and the rule of law. In matters of expertise, and in areas in which agencies daily deal with problems within their special fields of competence, a degree of judicial deference to the administrative action is not only justified, but is also warranted and required.

Nevertheless, it must be added that, without the beneficial

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[49] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 92-94 (1921).

[50] F. FRANKFURTER, LAW AND POLITICS 52-53 (A. MacLeish & E. Prichard, Jr. eds. 1939).

scrutiny of judicial review, government officials may on occasion forget that all public servants are duty bound to obey the law, and protect the rights of the persons whom they are to serve. By subjecting administrative action to the careful scrutiny of the courts, we help preserve and achieve a lawful society consistent with the constitutional guarantees of due process and equal protection of the law.

X. Conclusion

In conclusion, we may ask: "What, then, is required of all public servants, who serve the people under the law?" A thoughtful answer brings to mind the reading from the Old Testament in which the Lord appeared to Solomon in a dream and said: "Ask what thou wilt that I should give thee," and Solomon said: "Give therefore to thy servant an understanding heart, to judge thy people, and discern between good and evil." Since the word was pleasing to the Lord, that Solomon asked for wisdom to discern judgment, Solomon was given "a wise and understanding heart."[51]

In a finite world of frail human beings, it is too much to expect that public officials possess the wisdom of a Solomon in the performance of their duties. Surely, most citizens would welcome and be satisfied with "a wise and understanding heart." All citizens, however, may properly expect that public officials act lawfully, within the bounds of law, and serve to secure, not deny or violate, the fundamental rights of the persons whom they have sworn to serve, to the best of their ability, and under the law.

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[51] 3 *Kings* 3:5-12.